

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 9, 2005

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

SHERWIN ALUMINA COMPANY

:
:
:
:
:
:
:

Docket No. CENT 2005-180-M
A.C. No. 41-00906-54704

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 16, 2005, Chief Administrative Law Judge Robert Lesnick issued to Sherwin Alumina Co. ("Sherwin") an Order to Show Cause for failure to answer the Secretary of Labor's petition for assessment of penalty. On November 2, 2005, Chief Judge Lesnick issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On November 8, 2005, the Commission received from Sherwin a letter addressed to Chief Judge Lesnick stating that it did answer the Secretary's petition for assessment of penalty on July 27, 2005, and submitted a copy to the Commission. Let. at 1; Ex. 2. Sherwin states that it confirmed with the Secretary's trial counsel that the Secretary's Regional Solicitor's Office received its answer and that she does not oppose setting aside the judge's order of default. Let. at 2. Counsel for Sherwin also states that the judge's September 16 show cause order was mailed directly to the company and not to him and that he has been unable to verify who received the order. Let. at 1-2. In support of its request to set aside the judge's default order, Sherwin points out that it has contested the citation underlying the proposed penalty assessment at issue here and that the contest proceeding is currently stayed before Administrative Law Judge Avram Weisberger pending the initiation of this penalty proceeding. Let. at 2. Sherwin asks the Commission to reconsider the judge's default order. *Id.* The Secretary has indicated that she does not oppose Sherwin's request.

The judge's jurisdiction in this matter terminated when his decision was issued on November 2, 2005. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Sherwin's correspondence to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

Based on the present record, it appears that Sherwin may have mailed its answer to the Commission at the wrong address. It also appears that the judge's show cause and default orders were sent directly to the company, and not its counsel. Having reviewed Sherwin's request, in the interest of justice, we remand this matter to the Chief Administrative Law Judge, who shall determine whether relief from default is warranted, and for further proceedings as appropriate.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Michael D. Hudlow, Esq.
Gonzales Hoblit Ferguson
802 North Carancahua, Suite 2000
Corpus Christi, TX 76470

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

Thomas A. Paige, Esq.
Office of the Solicitor
U.S. Department of Labor
525 South Griffin St., Suite 501
Dallas, TX 75202

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021